No. 80-1508

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In The
Supreme Court of the United States

October Term, 1980

GILA RIVER INDIAN COMMUNITY
Petitioner,

vs.

HENNINGSON, DURHAM & RICHARDSON,
and RANIER CONSTRUCTION COMPANY, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether 28 U.S.C. § 1362 grants the district courts jurisdiction over actions brought by Indian tribes not arising under federal law if the action could have been brought by the United States on behalf of the tribe under 25 U.S.C. § 175.

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STATUTES

United States Code	
28 U.S.C. § 1331	2,3
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H.R. Rep. No. 2040, 89th Cong., 2d Sess. (1966)	2
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ARGUMENT

1. The decision below correctly holds that the scope of the grant of federal question jurisdiction for tribal plaintiffs under 28 U.S.C § 1362 is the same as that of the general federal question jurisdictional grant under 28 U.S.C. § 1331, but for jurisdictional amount. The legislative history of 28 U.S.C. § 1362 clearly shows that the sole effect of that statute was to eliminate for tribal plaintiffs the $10,000 amount-in-controversy requirement formerly a part of 28 U.S.C. § 1331. S. Rep. No. 1507, 89th Cong., 2d Sess. (1966); H.R. Rep. No. 2040, 89th Cong., 2d Sess. (1966).

2. There is no division among the circuits. No appellate court has ever held that the federal question concepts of 28 U.S.C. § 1362 are different from the established federal question concepts of 28 U.S.C. § 1331. The Second Circuit is in complete agreement with the views of the Ninth Circuit expressed in this case. *Oneida Indian Nation of New York State v. County of Oneida, New York*, 464 F.2d 916 (2d Cir. 1972), *reversed on other grounds*, 414 U.S. 661 (1974). *See also, Mescalero Apache Tribe v. Martinez*, 519 F.2d 479 (10th Cir. 1975); *Blackfeet Indian Tribe of the Blackfeet Indian Reservation v. Wippert*, 442 F. Supp. 65 (D. Mont. 1977).

3. The Tribe's second Question Presented suggests that its claim for breach of contract is also somehow a tort claim. No such contention was preserved for appeal since the Tribe acknowledged in the District Court that its action was "for the breach of the contractual duties of the defendant ... based upon the Owner-Architect Agreement." (Clerk's record, page 78.) In any event, the Tribe's claim is for a well-designed and well-constructed building. If the Tribe has a right to such a building, it is solely by virtue of the Tribe's contracts with Respondents promising it such a building. No treaty or federal principle of Indian land law gives tribes a right to have buildings constructed on their reservations.

4. Petitioner's third Question Presented speaks to whether it was error to deny it leave to amend its complaint. Both the Court of Appeals and the District Court considered the tendered amended complaint and found that it did not arise under 28 U.S.C. §§ 1331 or 1362. Pet. App. A-4, A-5, & A-22. The Court of Appeals' recitation of the case includes allegations appearing for the first time in the tendered amended complaint (*e.g.*, that the fee title to the reservation is held by the United States in trust for the Tribe, Pet. App. A-4). Both the lower courts treated the offered amended complaint as if it were filed and found it jurisdictionally wanting. Therefore, Petitioner was not prejudiced by the formality that the District Court denied leave to amend.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted

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March 13, 1981